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Office of The General Counsel

1 September 1943

Chief, Civilian Personnel

Director's Authority to Delegate Power to Employ
Departmental Personnel

OGC HAS REVIEWED.

1. This memorandum is supplemental to the memorandum from this office dated 29 July 1943, concerning the above subject.

2. While it is our opinion that the Director of OSS does not have the authority to delegate to "subordinates" the power to employ departmental personnel, this must not be construed as denying to the Director the right to authorize the Assistant Director or Deputy Directors to perform such functions. It is our judgment that such authorization not only would be legal but would serve to implement the expressed intent of Congress in providing in July 1943, for the posts of Assistant Director and one Deputy Director, with full knowledge that other Deputy Directors (not to be paid from funds then appropriated) existed in OSS.

3. The assistant or deputy head of a department or independent establishment is traditionally an official designed to serve as the "alter ego" of the head, performing functions which while policy-determinative in nature (and hence not delegable to subordinates) are so many and time-consuming that their continued discharge by the head would cripple the proper conduct of the agency.

This practical concept of such posts has been recognized by the law in numerous instances. In 20 C. G. 27, in discussing the delegability of the power to appoint departmental personnel (the precise question now before us), the Comptroller General declared (at p. 29):

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"While I do not find any specific statutory authority for Assistant Secretaries of State to act in lieu of the head of the department in matters of discretion vested in such head, the title and nature of the position have generally been held to authorize assistant secretaries of the various departments to assist the head of the department in all matters requiring his personal attention or discretion and to act in lieu of the Secretary of the department when authorized by him so to do. *McCullum v. United States*, 17 Ct. Cls. 92."

Again, after holding that such authority cannot be delegated to subordinates, the Comptroller General emphasized (at p. 29):

"This is not to be understood as holding that such discretion may not be delegated to Assistant Secretaries of State."

In 20 C. G. 779, 782 the status of the Assistant Secretary of War was recognized as equivalent in power to that of the Secretary. See also 21 C. G. 921, 922; 20 C. G. 797, 799; 7 C. G. 518, 521.

In 16 C. G. 695 the general principle was thus summarized by Elliott, A. C. G. (at P. 696):

"Where, as in this case, the law requires in specific terms the certification by the head of the department, the authority to certify may not be delegated. The action may be only by the Secretary of the Treasury or an Under Secretary or Assistant Secretary authorized by law to perform any duty the Secretary may perform."

It should be noted that in so referring to assistant heads of departments, the above decisions are not based on statutes expressly declaring that the officials referred to "shall act in the place of" the head. 5 U. S. C. 182, creating the post of Assistant Secretary

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of War, merely provides that he "shall perform such duties in the Department of War as shall be prescribed by the Secretary of War, or as may be required by law." See similar language in 5 U.S.C. 244 (Under-Secretary of Treasury), 5 U.S.C. 247 (Assistant Secretary of Treasury) and 5 U.S.C. 421 (Assistant Secretary of Navy). 5 U.S.C. 152 does not contain even that general language, in creating the posts of Undersecretary of State and Assistant Secretaries of State; the statute simply specifies that there shall be such officials. Yet in McCullum v. U.S., 17 Ct. Cl. 92 (1881), the Court of Claims held that when the acts, decisions or directions of such assistant secretaries are reduced to writing, signed by them in their official capacity, filed or recorded among the archives of the department, and do not appear to have been revoked, annulled, or modified by the head of the department or bureau, they must be held, in the absence of fraud, mistake, or irregularity, to have been done within the scope of the authority of the assistant, and to be as binding on the government as though expressly ordered by the superior.

In the light of these considerations, it is apparent that Congress intended comparable powers to be vested in the Assistant Director and at least one Deputy Director of OSS, when it expressly provided for such posts in the National War Agencies Appropriation Act, 1944 (P. L. 139, 78th Cong. 1st Sess.). This was, of course, simply Congressional recognition of posts previously approved by the Joint Chiefs of Staff, acting under the general authority over OSS granted by Military Order of the President dated June 13, 1942. We may assume Congressional approval at that time of the existence of other Deputy Directors, approved by the Joint Chiefs of Staff, facts concerning whom were placed before the Appropriations Committee but the compensation of whom was not to be paid out of that appropriation.*

This view is strengthened by the traditional rule of law that a public official is impliedly granted all powers essential to the full accomplishment of the purposes for which the office was created.

* See Hearings, Natl. War Agencies App. Bill, 1944, Part 2, pp. 690 et seq.; see also Committee Report on same, June 16, 1943, p. 12.

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Board of Education of Boyd Co. v. Trustees of School,
256 Ky. 432, 76 S.W. (2d) 267 (1935);

City of Wilburton v. King,
162 Okl. 32, 18 P. (2d) 1075 (1933);

So. Pac. Ry. Co. v. Stibbens,
104 Cal. App. 664, 285 Pac. 374 (1930);

Comm. v. Picard,
296 Pa. 120, 145 Atl. 794 (1929).

In Knuckles v. Board of Education, 272 Ky. 431, 114 S.W. (2d) 511 (1938), the post of "assistant county school superintendent" had been created by the legislature, which made no effort to outline his duties. The Supreme Court of Kentucky declared (114 S.W. (2d) 511 at 515):

"It must be assumed that an assistant county school superintendent may perform all of the public duties imposed upon the principal superintendent."

These purely legal considerations are based, of course, on practical necessities demanding a realistic view of statutory obligations imposed on important executives. An Attorney General Cummings declared (39 Op. A. G. 541 at 546):

"The theory underlying the vesting in an executive officer of numerous duties, varying in importance, is not that he will personally perform all of them, but rather that he will see to it that they are performed, the responsibility being his and he being chargeable with the result. The accomplishment of this is one of the highest responsibilities of an executive and there is not, and in reason cannot be, any set formula by which it is to be done."

See 35 Op. A.G. 15 for similar discussion of the need for a liberal view in these matters because of the multitudinous duties imposed upon such officials as the Secretary of the Treasury.

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Comparable reasoning in the case of an "Acting Head" may be found in the leading case of Morgan v. U. S., 298 U. S. 468 (1935), the famous squabble between the stockyards and the Secretary of Agriculture. Although the court did not rest its decision on the point, Hughes, C. J. did take occasion to remark (at p. 479):

"We may likewise put aside the contention as to the circumstances in which an Acting Secretary may take the place of his office chief. In the course of administrative routine, the disposition of official matters by an Acting Secretary is frequently necessary and the integrity of administration demands that credit be given to his action in that capacity."

It is for these reasons that you are advised that any duty imposed by law on the Director may be performed by the Assistant Director or a Deputy Director. While the Director's knowledge and approval of their actions may normally be presumed, specific authorizations should be executed for the record and for exhibition to or filing in appropriate offices of the Government, upon their proper demand.

4. Submission of such problems to the Comptroller General is not necessary and the draft of submission prepared by the Chief, Finance is returned herewith.

APPROVED:

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